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Who is Michael Pasterczyk? 1 02:52:12 2 A. That would be Mr. Pasterczyk. He was a CPA 02.52.14 3 consultant at the company we used. 4 02:52:24 He's not employed by DMS, right? 5 A. No, he's not. 02.52:25 6 So you would have had to phone him, e-mail 02:52.26 7 him, or write him a letter to get him involved in a 8 review of the Kearney claim? 9 02-52-36 A. No, I believe at this time, Mike, he had a 10 regular time he would come into the office, so you 11 could just go over and talk to him. 12 So there's nothing in the claim file other 13 than his invoice indicating that he had any 14 involvement in the Kearney claim; there's no report by him that's documented, there's no phone mail 15 16 message to or from him authored by you, there's no 17 e-mails, there's nothing in the file except for this 18 invoice 02:53:08 19 Why is it that there would be nothing in 20 the claim file reflecting on the request that he 21

perform two hours of financial analysis or his conclusions of his financial analysis other than his invoice?

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I just see this memo here. I don't know

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exactly what it is that he did at this point or if there wasn't anything else in the file. If he put something together, I don't remember.

Q. Well, there's nothing that he put together that's in the claim file other than his invoice. Do you know whether or not there's anything else he put together?

> MR. ELLIS: Do you want to show him the claim file?

- Q. (By Mr. Roberts) You can answer the question. You don't have to listen to him. He can object for the record, but he really can't prelude your testimony.
- A. You know, I don't recall. I did talk to him on financial issues routinely.
- Q. Okay. Was the financial aspects of Mr. Kearney's claim important?
  - It was important.
- If you sought his counsel and he performed a financial analysis, why would there be no reflection of that on -- and it's on an important issue, why would there be no reflection of that in the claim file other than his invoice?

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A. You know, I don't remember the conversation

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or what it is that -- if he looked at anything or if it was just a discussion with him. I just don't recall. I can't explain.

Q. The next document in Exhibit 44, the nex tab, is Piechowski. Is she an outside consultant also?

My understanding is that she is.

Did you have Mr. Kearney's authority to share his medical information with people outside DMS?

A. Can you repeat the question, please?

Did you have Mr. Kearney's authority in April of 2000 to share his medical information with people outside DMS?

A. I think we had authorizations from him in the file. I think Piechowski, this is an area that she specializes in as far as depression and things of that nature, so it would have been appropriate to send that to her.

Q. My question is simply did you have his authority to send her his medical records, yes or no?

A. Again, I don't recall what, at that time, the order in which we had received his authorizations. I thought we had an authorization in the file, I'm sure the file shows that.

Okay, so you're sure that the file would contain an authorization dated prior to April 26, 2000 giving you the authority to share his medical information with third parties?

A. I could look at the file, if you'd like. I don't specifically recall. I would assume.

You wouldn't have done it without his authority, right?

Again, I'm sure there was something in there that --

You're sure there's something in there because you wouldn't have done this unless you had the property authority, is that correct?

Can you repeat the question again?

There's no way that you would have shared someone's medical information -- you won't even give me your residence address -- there's no way you would give someone's medical information to some third party unless you had the authority to do so, isn't that right, Mr. Mills?

A. Again, I don't remember exactly what was in there, but I'm sure that there was some authorization in there that he had given us. Plus, we do get

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1 medical reviews from people to understand the medical 2 information. 3 Q. Okay. Let's do this simply. Five hours 02:57:09 ago I asked you to tell me what your residence 4 5 address was. You objected because it's private information. Now, certainly if you have that great a 6 7 sensitivity about private information, you know that 8 there is no way on earth that you would have given Q Mr. Kearney's medical information to a third part 10 without his authority to do so, isn't that right? 02:57:32 11 MR. ELLIS: Objection. 02-57.36 12 Again, I don't recall exactly the circumstances of this at this point in time. 13 02:57:40 14 Q. Very well. The second page refers to a 15 SPAN report. What's a SPAN report? 02:57:47 16 17 02:57:58 18

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A. I know it's an acronym for something, I don't know the specific terminology of it. Q. Let's turn back to 43. Document 3078 is the next one I want to discuss with you. This is a handwritten note of a conversation you had with Mr. Kearney on May 19 of 2000, Bates labeled 3078, can we agree on that?

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Halfway down there you start a sentence,

fourth line, it says, "His next payment is scheduled for both" -- let's read the whole thing. Tell me if I read it correctly.

"Chris Kearney called. He only received a payment last month on policy 493029. It appears that we inadvertently omitted payment on policy 538069. I will go ahead and authorize today. His next payment is scheduled for both policies on 5/25. We spoke about his claim and some of the issues. I told him a response was sent to his physician, RFM," right?

Correct.

In order to speak intelligently about the issues in Mr. Kearney's claim on May 19, 2000, you must have reviewed the claim file prior to that day, right?

A. I would have had a working knowledge of it at that point in time, I would imagine.

Could you turn to 3069. And before we go to that, let's turn back to Exhibit 44, the next tab of 44. The next tab of 44 in the tab says "CS 6/22/00." There's a June 22, 2000 report from CS Claims Group, right?

> A. Bates stamp 3070?

Right. Q.

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Correct.

Yes, we can.

A.

And the last page of the exhibit there's a Bates stamp 3068, another invoice from CS Claims Group, identifying the total due for June 2002 as

Q. Now, we've gone over already today three different reports from CS Claims Group. You've confirmed for me that all the information generated from those reports is consistent with what Mr. Kearney was telling you. Why would you request additional investigation and surveillance at the cost of \$5,300?

what my line of thinking was at this point in time, but we do try to get a representative sample over periods of time that the insured's statements continue to be consistent with what he puts down as far as his work activities on a month-to-month basis.

Q. Do you think that Mr. Kearney from March to June 2000 may have gotten over his severe depression which had lasted for seven years prior?

file, once again, of any note or of any communication or letter that you had sent or received from CS Claims Group authorizing them to conduct this additional surveillance, right?

A. Not that I recall.

Q. Giving them instructions on what you wanted done, right? Correct?

A. What's the question?

There's nothing in there advising or preserving what your further instructions were?

A. I don't recall. I can look at the file.

Q. Let's turn back to Exhibit 43. Bates number 3069. Now, this appears in the claim file because it has a Bates number on it. It has a claim file Bates number on it, 3069.

A. 3069 faxed Monday, July 3?

Yes. It's a fax dated July 3, 2000 to you from Chris Kearney. That's what it says, right?

A. Yes, it does.

And the subject says -- the entire subject of this fax is "Cost of Living Increase in Checks." That's what it says, right?

Yes.

It says, "Mr. Mills: I received the two

\$5,361.50, right? A. Correct.

You know, again, I wouldn't recall exactly

You know, I don't know. People get better.

Okay. And there's nothing in the claim

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checks for June 2000. There should have been a 7 percent cost-of-living increase at some point in the last two months. Usually, I don't have to ask for it, it's updated automatically. Please check into. Thank you. Also, I received your letter and form. I will be responding back to you within a couple weeks. I have some concerns as I previously stated in a

Did I read the entire communication --

Yes, you did.

letter to you a few months back."

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- -- correctly? Q.
- A. Yes, you did.
- He asked you to please check into the cost of living adjustment of 7 percent, right?
  - That's what it says here.
- When the policyholder asks you to do something relative to the claim that you're working on, do you make every effort to do so?
  - A. Can you repeat the question?
- When a policyholder asks you -- you understand what a duty of good faith is?
  - A. Yes.
- What's your understanding of good faith duty that insurers have to insureds?

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To handle things timely, promptly, look into every interest of the insureds and ensure that they get every benefit they're entitled to.

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Q. Okay. So if an insured writes you and says, "I didn't get all the benefits that I think I'm entitled to, will you 'please' check into it," do you think it's consistent with the duty of good faith for you to examine the policyholder's concern and determine whether they're right and they've received less monies than what they're entitled to?

A. Can you repeat the question again? THE COURT REPORTER: "So if an insured writes you and says, "I didn't get all the benefits that I think I'm entitled to, will you 'please' check into it," do you think it's consistent with the duty of good faith for you to examine the policyholder's concern and determine whether they're right and they've received less monies than what they're entitled to?

A. I think it's fair to say that, and I would look into that to see if that, in fact, is the case.

My question was, do you think it's consistent with the affirmative duty that you have of

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good faith for you to do that?

- A. I think it would be fair to say that.
- Q. And in performing that affirmative duty of good faith, isn't it appropriate that you be thorough and detailed in your exploration of the issue?
- A. I would look at something like this and go ahead and in an effort to be quick and fair with this gentleman, get his benefits out as quick as possible.
- Q. As quick as possible. Okay, let's reserve that comment for a second. But that wasn't responsive to my question. What I asked was, in performing what you concede would be consistent with your affirmative obligation of good faith, in performing that duty, don't you think that it is essential that your review of the issue that you've been asked to investigate be as thorough as possible?
- A. It would be important to review anything, whether that takes place right at that point in time. I don't know whether the circumstances of what's going on, whether or not that would occur.
- Q. Mr. Kearney asked you a simple question: Am I entitled to a 7 percent COLA increase sometime in May or June of 2000? And he asked you to please check into it, Mr. Mills. Do you think that it's

inappropriate, considering your affirmative duty of good faith, that it be expected that you perform a thorough analysis of the issue?

- I checked into it. A.
- Q. Okay.
- Can I finish my answer?
- Go ahead.
- I checked into it, which encompassed going into the claim system, recognizing that a 7 percent COLA was referenced there, and that, yes, it did happen in the previous years in May or June, and  ${\tt I}$ went right ahead and increased the payment and brought him up to date.
- Q. Okay, so you didn't review the policy. You're staying away from admitting that you ever reviewed the policy?
- A. I didn't review the policy at that point in time, I was getting it out.
- Q. We're sitting here in May of 2004. We're almost four years from the date of this fax, and you don't have memory of much of what happened during the administration of the claim but you can testify under oath, under sworn testimony, that you did not review the policy prior to this date. Do I understand that

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A. To my recollection, yeah, I probably did not look at it that closely to that point in time. It's unfortunate that I continued to -- with this

correctly?

error. It was an old payment of benefits. Q. Fine. This is dated July 3 and you told me that you would, as quickly as possible, look into an issue because good faith requires that you do so. The next page is Bates labeled 3424, and we're now 25

days removed and it's July 28, and Mr. Kearney sends you another fax. And tell me if I read this correctly.

It says, "Mr. Mills, following is the completed form request. I will put the original in the mail today. Number one, did you check out the increase in benefits which should be due per my fax of July 3, 2000?" Did I read that correctly?

Yes, you did.

Q. Okay. So even though you admit that your affirmative duty of good faith required that you look into that issue as quickly as possible, Mr. Kearney, three and a half weeks later, was obligated to contact you again because you had not responded to him. Is that consistent with good faith?

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03:10:52 Again, I don't understand or am aware of my 2 circumstances at this point in time, if this is 3 something that I saw exactly on this date. You know, 4 on the fax it's dated these dates. I don't know when 5 I would have seen them necessarily.

> Q. Okay. Well, we'll answer that question. The next page, Bates labeled 3064, right?

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And this is your letter to him. This does have your initials on it, right?

A. Yes, it does.

Tell me if I read it correctly. Chris Kearney, Glengyle Avenue, regarding policy numbers H-493029 and H-538069. "Dear Mr. Kearney, Thank you for your letters of July 3, 2000 and July 28, 2000." Did I read that correctly?

Say that again, please.

Did I read that sentence correctly?

Now, if you write a letter to someone saying that you got letters of July 3, 2000 and July 28, 2000, can we assume that you're telling the truth?

Yes, you can.

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Tell me if I read the second paragraph correctly. "Under separate cover, you should receive

make reference to the cost-of-living adjustment riders under both policies and the effective date of those, right?

Mr. Mills, can you turn to 3061 in Exhibit 43. This is letter from Mr. Kearney dated August 19, 2000, right?

A. Yes, it is.

Thanking you for your letter of August 11, is the first sentence, right?

Q. He then writes, "I received the checks you referenced, thank you. I am still puzzled as to why they were not included in the previous checks as in past years. It appears that this is no longer an

automatic change."

When he again raised with you the COLA adjustment in August of 2000, did you go back and see if he was entitled to it?

A. No, because I think that has to do with a situation where Jefferson-Pilot had the automatic increase in previous years when they were administering the claim. When that information was all registered on our claim system, it didn't pick it up.

Q. That wasn't my question. He expresses to you his puzzlement that he didn't get the adjustment automatically. When he raised that issue with you, when you received this letter, did you think to yourself, "Man, I should go back and look at the policy and see if he's entitled to it"?

A. No, because I would have assumed that he was and kept the status quo as the payments had beer

Did you ever read the policy, sir? Truthfully.

A. Yes, I did, I think I testified, at the infamous coffee house.

That was the first time you read the policy, at the coffee house?

two checks reflecting the increase under the cost-of-living adjustment (COLA) rider for both of your policies that become effective on May 6, 2000. I apologize for this oversight." Did I read that correctly? A. Yes, you did. Q. Now, in that paragraph you specifically Yes, I did.

Α Yes

> 03:15:03 23 24

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To my knowledge. The first time you read his policy was at Q. the coffee house? To my knowledge of going through that.

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Q. So you -- you didn't say that this morning, but let me be clear about what your testimony is. Your testimony this afternoon, and it's not what you said this morning, but your testimony --

> MR. ELLIS: Objection to Counsel's speeches.

- Q. (By Mr. Roberts) It wasn't your testimony this morning, but now you're saying that you never read Mr. Kearney's policy until October of 2001 when you were sitting in the Cuban coffee house when you made your extraordinary revelation.
- A. Well, let me clarify that. I would say, although I don't recall a specific time, that I would look through the policy; I don't recall specifically looking at the language of the policy in question here until that time in the coffee house.
- Q. Did you read the policy before the coffee house or did you not read the policy before the coffee house?
  - A. Again, I recall reading at some point in

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time, I don't know specifically when that happened.

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Q. You recall our discussion this morning about the WJ567A policy. Mr. Kearney isn't the only one that had that policy for persons that you were responsible for, right?

A. I would imagine there were others that had

Q. Are you on 3061? Just past the halfway point there's a paragraph that starts "Your," do you see that?

"Your authorization."

that includes friends, neighbors, family, present and former business associates, customers cetera. I will not give my consent for you to discuss anything with them. If you choose to do this regardless, it is not with my consent."

Did I read that correctly?

Yes, you did.

That's not the first time that Mr. Kearney expressed that concern, is it?

Mr. Kearney expressed several concerns during the administration of his claim. I'd have to

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go back in the file and look at all the time frame and junctures in which that occurred.

Q. You don't know whether that is the first

her production of records?

A. I recall something along that line.

And did there come an issue about the time it would take for her and the cost it would take for

A. I just recall that it was quite some time before those records were produced.

her to accomplish your request?

Do you recall in this letter the third -excuse me, fourth paragraph of this letter to Donna Judd-McClure, which is 3056, it says, "In speaking with the psychologist in this office, it's my understanding that your fee request is extraordinary." Do you see that?

> A. Yes.

03:19:30 13 And you later called her fee request 14 extortion, do you remember that?

A. I remember something along that line.

Do I need to pull out the letter or can we agree that you called her fee request tantamount to extortion?

A. It sounds familiar but if you want me to . confirm it, I'll look at it.

Q. Do you know how much your IME psychologists charge for their review? Do you know what their hourly rate was?

A. No, I do not.

3 time or not as of August 19 of 2000? 4 5 I would imagine that it wasn't the first 6 Q. The second to last paragraph says, "For a 7 03:17:44 number of years I've signed the authorization form 8 9 for Jefferson-Pilot on their forms, which is not s 10 broad and potentially intrusive to my policy. Why do you now ask me to sign much more broad forms?" Did 11 12 I read that correctly? 03:18:02 13 Yes, you did. 03:18:03 14 Did you ever answer Mr. Kearney's question? 03 18:08 15 I don't recall. Do you think it's consistent with the duty 03:18:08 16 17 of good faith that you, as quickly as possible, 18 answer that question? 03:18:16 19 I think that question was answered in the 20 file. 03:18:24 21 Q. Okay. 3056. Did you have communications 22 with Dr. Judd-McClure over a period of months about

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•		Case 1:02-cv-00479-MRB <sup>201</sup> Document	192-2
03:19:59	1	Q. Do you know if it was more or less than	03:21:52
	2	what Dr. Judd-McClure was requesting?	03:21 53
03-20.04	3	MR. ELLIS: Objection.	
03:20:07	4	A. Can you repeat the question?	03:21 56
:07	5	Q. Do you know if what you paid your on	03:21.57
	6	psychologist was more than or less than what Dr.	
	7	Judd-Mcclure was requesting as an hourly rate?	
03:26:17	8	A. I think what you're referring to is the	03:22:08
	9	examinations, the independent examinations versus	03:22:08
	10	reproduction of medical records.	
03:20:29	11	Q. Yes, sir.	
03:20:30	12	A. I know IMEs cost, you know, generally one	
	13	to two thousand dollars.	03-22-23
03:20:37	14	Q. Can you turn to the Exhibit 44 tab which	
	15	says, "Kenny Hire 2/9/01."	
03:20:54	16	MR. ROBERTS: Let's go off and	03:22:29
	17	change videotapes.	03:22:31
03:20:56	18	THE VIDEOGRAPHER: Going off the	
	19	record at 3:20 p.m.	03:22:38
03:20:58	20	(Off the record)	03:22:38
03:21:28	21	MR. ROBERTS: Back on record at 3 20	
	22	p.m.	A
03:21:41	23	Q. (By Mr. Roberts) Mr. Mills, Kenny Hire	63:22:49
	24	2/9/01, are you there? Bates labeled 0011?	63:22:49
		ACCURATE COURT REPORTING (413) 747-1906	

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03:21:52 1 The cost of IME is \$300 per hour, is that 03:21:53 2 Q. 3 right? 4 That's what it references here. 03:21:56 So you hired a gentleman with the same 03:21.57 5 background, psychologist, as Dr. Judd-McClure, and 6 7 you willingly paid him \$300 an hour, right? 8 Mm-hmm. 03:22:08 9 If you turn to this letter, in Exhibit 43, 03:22:08 it's not Bates stamped. For some reason this 10 letter's not in the claim file. But you received a 11 handwritten letter from Dr. McClure, did you not? 12 03-22.23 13 MR. ELLIS: I'm going to object to this letter unless it's established that it 14 15 was received 03:22:29 16 03:22:31 17

MR. ROBERTS: Fine.

(By Mr. Roberts) Did you receive this letter from Dr. Judd-McClure?

A. I don't recall.

Okay. Do you see that it's purportedly a letter written to you at your address purportedly handwritten and purportedly signed by Dr. McClure?

> A. Yes.

And you see at the top of page two that Q.

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she's requesting \$250 an hour?

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A. It says here "My fee for services you have requested is \$250 per hour."

Q. Okay. Now let's forget about the letter. Let's assume it never existed. Do you have a memory about whether or not her fee request was \$250 an hour that you felt was extortionary?

A. I don't know what -- again, what this letter's referring to as far as what services --

Forget about the letter. Forget about the letter. Do you recall that she was requesting that you reimburse her at the rate of \$250 an hour for the work that you were asking her to do?

MR. ELLIS: Objection.

Can you repeat the question?

Do you recall that she was requesting \$250 an hour to perform the work that you were asking her

A. I don't recall as I sit here today what she was requesting.

Well, if it was extraordinary and tantamount to extortion, was it greater than what your own psychologist was charging you?

MR. ELLIS: Objection.

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Again, without being able to look at this all in the full context, I don't exactly know what the services that she was charging 250 is for. It looks like in this letter that a part of that request was based on a conversation I've had with in-house psychologists. My recollection that it was information or the money she wanted was for just a reproduction of medical records.

Q. For her time spent doing that for you, right?

Just to copy medical records.

Her time spent copying medical records?

That's what I recall.

Okay. If she takes time out of her schedule to copy medical records for you, time that she otherwise could be seeing a patient charging \$250 an hour or more, is it extortionary for her to say "Pay me my hourly rate because I'm missing the opportunity to see patients"?

MR. ELLIS: Objection.

A. Again, that doesn't seem -- it seems like an unreasonable request to produce those types of records.

Q. Very well. Can you turn to an exhibit for

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1	just a second and then we'll flip back, but in	03.27.33 1 Q. How is that extortion? I asked you for
2	Exhibit 43 there's a letter dated January 24, 2001,	2 your definition of extortion. Is that it?
3	Bates labeled 3320 in that stack about 20 pages down.	03.27.45 <b>3</b> A. Yes,
4	It's dated January 24, 2001. If you want to go back	03.28.07 4 Q. When you first requested Mr. Kearney go see
5	that way, it's in chronological order.	5 an IME, did he agree to do so?
03:25:43 6	A. What's the date?	My recollection is that he didn't
03:25:45 7	Q. January 24, 2001.	7 necessarily want to go at the first point in time,
63.26:01 8	A. What's the Bates stamp?	8 no. I'd have to look at the file to confirm that.
03:26:03 9	MR. ELLIS: 3320.	00 28 25 9 Q. Turn to IME form 1901 in Exhibit 44. Do
03:26:07 10	Q. (By Mr. Roberts) It's a letter from you,	10 you mind putting those back in the order they came?
11	if that helps. I think you might have it.	11 Thank you.
03:26.36 12	In the third paragraph you're talking about	4) 2041 12 A. Can you repeat the question again?
13	Dr. Judd or Dr. McClure's charge, right?	Q. It's a middle tab, it has IME form 1901.
03:27:05 14	A. Correct.	14 This is a Disability Management Services medical
03 27:05 15	Q. And you say that what she's requesting her	15 resources referral form whereby you can request that
16	reimbursement rate be is tantamount to extortion?	16 someone with the experience to do so provide you with
03:27:13 17	<ul> <li>A. Yeah, I would say that that charge is</li> </ul>	the right person to conduct an IME, right?
18	excessive.	0)29/19 18 A. It is a medical resource referral form and
63:27:17 19	Q. And you say "tantamount to extortion"?	19 it gives labels for what you want, an IME, expert
03:27:23 20	A. Exactly.	20 record review.
03:27:23 21	Q. What does extortion mean?	Q. Was there something wrong about the way I
03:27:25 22	<ul> <li>A. That she's asking for a price that's well</li> </ul>	22 phrased it?
23	beyond the customary charge for something of that	0329.34 23 A. I just want to confirm that I'm reading the
24	nature.	24 same thing.
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Was I correct? 03:29:37 1 Q. 03:29:40 2 Yes, you are. 03:29:40 3 This is the form that you would complete if you're looking at a claim and responsible for a claim 4 5 if you desire to have a doctor designated to perform an IME, right? 6 A. This appears to be the form that was used 7 03:29:52 8 at that time, yes. 03:29:56 9 Q. Is this your handwriting? Yes, that is my handwriting. 03:29:58 10 03:29:59 11 Was this the first time you filled out a 12 form for someone to go identify the appropriate expert for you to conduct an IME of Mr. Kearney? 13 Can you repeat the question? 03 30 in 14 03:30:11 15 Q. Was this the first time you prepared a form like this so that some expert could be identified to 16 17 examine Mr. Kearney? To my knowledge, this was the first time. 03:30:24 18 And the following month Dr. Kenny and Couch 03:10:25 19 20 were both designated, and within a month of that Mr. 21 Kearney saw each of those doctors, right? 03-30-38 22 A. I believe he saw both those physicians 23 around that time. 033041 24 Q. Okay. So, it wasn't until January of 2001

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that you sought to have Mr. Kearney examined by independent medical expert, right? Correct. In October of 2000, months before you even first requested an IME, you started paying him benefits under reservation of rights, correct? A. I don't recall when that began. I mean, I'd have to take a look at the file. Q. It would be reflected in the file, is that your testimony? To my understanding. Are you mindful of an October 2, 2000 letter that your supervisor sent to Mr. Kearney? I remember something along this line. What's the Bates number of that letter? 3055. It's a three-page letter. Are there three Bates numbers associated with those? Oh, yes. 3053, 3054, 3055. Does this letter express to Mr. Kearney that the benefit has receiving as of that time would be subject to a reservation of rights? I think it's the third page. It says here that "While we await the above

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materials, the company's agreed to issue an additional benefit payment in the interest of good will. Under the circumstances, this payment is necessarily issued with the full reservation of rights."

Does that mean he's getting the payment under a reservation of rights?

Correct.

What does a reservation of rights mean?

Reservation of rights is something where there is some questions on a case but we're continuing to make the payment to an insured while we continue to gather all the information to make a benefit assessment.

Q. Okay, up to this point in time had you read the policy?

A. I would believe that I read the policy to some degree at that point in time.

Q. Okay. You put him on reservation of rights without a certainty that you had a full understanding of his rights under the policy?

A. It's more of the company reserving its rights under the policy as they're continuing to gather information. They don't want to -- while they

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still have questions about their claim and they're investigating it, they don't want to necessarily discontinue benefits to an insured, because we understand that can be harmful. So they're continuing to investigate, need more information, and in doing so they're not going to stop the payments. they continue to make the payments, but reserve the rights under the policy.

That wasn't my question. My question was, you began to pay benefits to Mr. Kearney under reservation of rights before you read his policy?

Again, not knowing to the full scope of when I read and what I read on the policy --

Q. Would it be good faith for the company to begin, to begin, after someone's been receiving benefits for seven years, to begin paying them under reservation of rights without the courtesy of even reading the policy?

MR. ELLIS: Objection.

A. I don't understand the concern because the insured's getting the benefits. The company's just reserving its rights under the policy, whether they've looked at every single page of that policy or portions of the policy, there's questions about it.

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Okay. And is it appropriate in good faith for an insurance company to begin paying benefits under reservation of rights without even conducting an IME, or even asking for an IME?

MR. ELLIS: Same objection.

A. Every case and the circumstances are different, you know --

Is it good faith --

MR. FORMUS: Give him a chance to answer. He was in the middle of a sentence.

MR. ROBERTS: I'm sorry, I thought he was finished.

MR. FORMUS: The witness is trying to finish an answer. You stopped him in midstream.

Q. (By Mr. Roberts) Go ahead, finish your answer.

Can you repeat the question again, please?

Do you have anything else to say?

A. I lost my train of thought when you guys started talking

I'll strike the question. Is it good faith for an insurance company to begin to pay somebody on reservation of rights when multiple surveillance of

the individual is consistent with what he reports to the company, you haven't asked him to undergo an IME, and you're not even certain whether you read the policy? Is it good faith?

MR. ELLIS: Objection.

A. You asked a long question and I'm trying to understand that correctly. I think it's good faith to continue to give every benefit of the doubt to the insured, to continue to pay him every month as you continue to address questions and gather information about the case.

Q. You're giving the insured every benefit of the doubt as to entitlement of benefits when you surveil him repeatedly, and every time you surveil him it's consistent with what he says, you don't ask that he go see an IME, and you're not even sure you even read the policy. You're giving him every benefit of the doubt by then putting him under reservation of rights?

MR. ELLIS: Objection. That's a speech, not a question.

Again, you got to look at the full context of the case of the situation. There's other questions about the case and we continued to pay him.

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Q. Very well. That October 2, 2000 letter putting Mr. Kearney's payments under reservation of rights was authorized by Bill Hughes. Had he reviewed the file before he sent that letter?

A. Could I see that letter again?

Q. Sure. Tell me if I'm reading the first paragraph. I'm going to mark as Exhibit 45 four letters, one dated October 2, 2000 from Mr. Hughes to Chris Kearney; a responsive letter of Mr. Kearney dated October 25, 2000 to Mr. Hughes; a letter dated October 19, 2000 from Mr. Spiegel to Mr. Hughes with a fax cover sheet; and a letter from Mr. Spiegel -- excuse me, to Mr. Spiegel from Mr. Hughes. The Bates numbers of these documents are 3053 through 3055, 3047 and 48, 3136 and 37, 0630, 3154 and 3155.

Does Mr. Hughes lie?

MR. ELLIS: Do you have a copy of

those?

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MR. ROBERTS: I do, but I can't put my hands on it immediately. We'll do it at the next break.

A. I don't know. You'd have to ask him.

Q. If he says that he's reviewed a policy, do you trust that he's telling the truth?

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A. You'd have to talk to him about what he does or doesn't do.

Q. All right. But what's your assessment of his credibility?

MR. ELLIS: Objection.

A. I think he's a pretty credible guy.

Q. Have you ever known him to lie?

Not to my knowledge.

Q. Have you ever known him to misrepresent anything to a policyholder?

A. Not to my knowledge.

Q. Mr. Hughes says in the first paragraph,

"Dear Mr. Kearney --

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MR. ELLIS: Excuse me, which letter are we on?

MR. ROBERTS: October 2 of 2000.

Q. (By Mr. Roberts) He says, "Dear Mr. Kearney, I've been asked to assist in the evaluation of your claim of ongoing disability benefits." Was that true, was he asked to assist?

A. I don't recall.

Q. Continuing, "Accordingly, to have a full understanding of your situation, I have reviewed your policy and your claim file." Did I read that

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1 correctly? 2 A. Yes, I did. 3 Is he an honest guy? 03:39:47 4 Like I said, I think he's a credible, 5 honest auv. Q. Does he understand disability insurance 6 policies and can he read unambiguous language without 7 8 misinterpreting it? A. He's an intelligent guy, I'm sure he can 9 10 read policies. Q. Can he read unambiguous language and nvanos 11 understand what the unambiguous language says? 12 A. You'd have to talk to him about that, about 03:40:13 13 14 his ability to read. 03:40:18 15 Q. What's your assessment? A. I understand him to be a pretty 03:40:19 16 17 knowledgeable guy. "The following is a summary of that review 63:40:22 18 and an outline of the documentation and information 19 we'll need in order to determine further benefit 20 eligibility." 21 So he was concerned about what level of

that, right?

MR. ELLIS: Objection. Unless you give him the context of the letter, I object.

MR. ROBERTS: "Objection" would have

MR. ROBERTS: Objection would in

been perfectly adequate for you.

A. Again, you'd have to ask him about that.

Q. The context of the letter, what your lawyer said? But he's an honest guy. If he says he did something, he did it?

A. He's an honest guy.

Q. And he can read unambiguous language without screwing it up?

A. He can read. You know, you'd have to talk to him about those things.

 $\,$  Q.  $\,$  Let's go to the November 2, 2000 letter to Mr. Kearney, 3043.

MR. ELLIS: Is that in 43 again?

MR. ROBERTS: 43.

MR. ELLIS: What's the Bates on it,

please?

MR. ROBERTS: 3043.

Q. This is from you to Mr. Kearney, correct?

A. November 2 letter, 2000, addressed to

Christopher Kearney in care of Ms. Mary Kearney.

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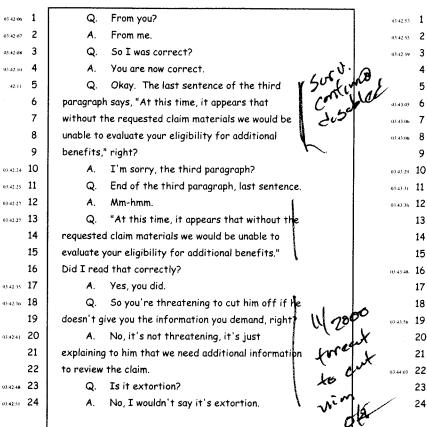
future and he wrote this three-page letter concerning

benefit eligibility Mr. Kearney had going into the

white is all

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I'm sorry, what was your --Q.

It's confirmation to evaluate a claim.

You're saying "I'm not going to pay you

money unless you do this for me." Is that not extortion under your definition?

MR. ELLIS: Objection.

A. Nο

Okay. Can you turn to 3038, December 5, 2000 letter?

> MR. ELLIS: Bates number, please? MR. ROBERTS: 3038.

(By Mr. Roberts) Third paragraph you say, "In a further effort to allow you sufficient time to submit the requested materials, Jefferson-Pilot has authorized an additional benefit check."

You never talked to Jefferson-Pilot about authorizing an additional benefit check at any time, did you?

I think initially I would have talked to them about the benefits because I don't think we had access to be able to issue a payment.

Q. For the December 2000 payment, it's your testimony that you had a communication with Jefferson-Pilot about, "Hey, we want some more

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information from Kearney, but he hasn't given it to us yet. Will you authorize me to make a payment?" Did that happen?

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A. This would have been a situation where I would have spoken with Bill about that. Now, whether or not -- you know, who he spoke with, he had given me an authorization to go ahead and make a payment.

So your testimony under oath is that you're telling the truth. Jefferson-Pilot at some time in the November/December 2000 time frame was contacted by someone at your office, the situation was explained to Jefferson-Pilot, and someone at DMS sought the affirmative authorization of Jefferson-Pilot to issue another benefit payment to Mr. Kearney, is that your testimony, sir?

Can you repeat the question, please?

Is it your testimony that in November of 2000 or December of 2000, there was a conversation with Jefferson-Pilot, or communication with them in some fashion, whereby DMS sought Jefferson-Pilot's authority to issue an additional benefit check to Mr. Kearney for December of 2000?

I don't recall necessarily being the one that would have had any type of communication with

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them. I don't know if others would have had at that point in time. But the authorization was given, whether it was through an individual at Jefferson-Pilot or people that were my superiors to go ahead an issue a payment.

There's nothing in the claim file that says there was any contact with Jefferson-Pilot other than contact with a guy named Swink to get Darryl Norris's address. Where is this supposed authority reflected anywhere?

A. I don't know exactly where it would be in there to suggest that. I know I had conversations routinely with Bill, Bill Hughes.

Q. You were never in Bill Hughes's vicinity when he had any communication with Jefferson-Pilot to obtain such authority, did you?

As far as this, no, I don't recall.

Mr. Mills, that sentence is not true. Nobody sought Jefferson-Pilot's authority for an additional benefit check, right?

MR. ELLIS: I will object to Counsel's statement on the record.

(By Mr. Roberts) Is it true? Is that sentence true?

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that extortion?

I don't know. I really don't.

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The last sentence of that paragraph "Unfortunately, if the requested items are not received within the next 30 days we will be unable to evaluate your eligibility for further benefits." Is

A. No, that's not extortion. That's just saying that we were unable to evaluate the claim.

Q. In every letter where you refer to receiving the authority of Jefferson-Pilot to do something or not do something, were you telling the truth2

A. I recall that in all these letters I had and I always have told the truth. Whether or not it was direct contact with myself or someone at Jefferson-Pilot or through any superiors, or that I understood it came from Jefferson-Pilot, or through them themselves, so I don't think there's any lies

Q. How many conversations can you recall you having with Jefferson-Pilot in 2000 and 2001 where you asked them for authority to do something on Mr. Kearney's claim?

A. I don't recall. I mean, that is several

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years ago. I had a number of cases. Several phone calls, you know, for business and other reasons. I don't recall.

Q. Did you seek their authority to hire investigators?

> A. No, I wouldn't do that.

That was \$12,000 every two months. Mr. Kearney's benefit was only 3,000.

MR. ELLIS: Objection.

Argumentative.

(By Mr. Roberts) Right?

I think that's what the total amount was.

The very first page of Exhibit 33, you're directing Jefferson-Pilot to issue payment. Why then would you be asking them for their authority to make a payment later?

Was that the first one?

a. Yes, sir. Do you want to see it? What does it say?

This Bates 3128 is when we first got the files, and I understand that we did not have the ability just yet to issue the payments ourselves. But if you take into context going forward to the time you're now questioning, I think what the

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questions and issues that we have on the case, there was a point of authorization I would need to go to in order to continue to pay the case.

Q. Where is it documented in the claim file? MR. ELLIS: I'm going to object unless you give him the claims file. Don't

MR. ELLIS: Let's go off the record for one second here.

MR. ROBERTS: I have five more minutes. Let's go back on the record and not

3310, which is another 20 or 30 pages down the way. Turn to the next page. This is the transcript of your phone conversation with Mr. Kearney.

it the other day. The portions of it that you

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A. I just saw the first couple pages of this. I don't recall the conversation particularly. I don't necessarily disagree that they're not my words or Mr. Kearney's words. I don't recall the conversation.

Can you turn, sir --

is what I'm going to read.

MR. ELLIS: Again, I object to the use of privately --

MR. ROBERTS: Good.

MR. ELLIS: -- recorded information without the consent of the party being recorded.

MR. ROBERTS: It's not illegal. MR. ELLIS: I didn't know you were the judge.

Q. (By Mr. Roberts) At the top of the fourth page, the first reference is you, then Kearney, then you, then Kearney, and the second Kearney reference

Did he tell you that he's going to go to the appointment, being the IME, "but I need this check to live on"? Do you recall him making statements to you that he needed his monthly check to live on?

make faces, Mike. MR. ROBERTS: I'm not making faces, Bill A. I don't recall them. I can look at some documents for you. Q. Let's turn to --

> waste time Q. (By Mr. Roberts) Turn to Bates number

Now, you say you reviewed only portions of reviewed, were they accurate, as far as you know?

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03.51:56 1 I don't recall that particular statement at 2 that time. 3 Q. Then tell me if I'm reading this correctly 03.51:59 4 "Do you understand that" -- this is Kearney 5 continuing to talk -- "I have expenses to pay. I 6 haven't been working very much and all, and it's due 7 to all this (pause) all this shit I'm going through." Your response was, "Um-hum, um-hum." 8 03:52:15 9 "Kearney: And umm, I'm not afraid of being 03.52:16 10 examined by a doctor." 03:52:22 11 Your response is, "Oh, it's not -- it has 12 nothing" -- and he interrupts, "I" -- and then you 13 continue, "I know, I hear that. It's not about being! 14 afraid of going to an examination. I mean, I" -- and 15 then Kearney says, "Why don't you just send me the 16 other release form and I'll sign them. Your new form 17 is so broad and you haven't" -- then you say 18 "That's -- that's their form. That's 19 Jefferson-Pilot's form that every one of their 20 insureds is, to my knowledge, completing right now." Were you telling the truth when you told 03:52:50 21 22 him it was Jefferson-Pilot's form? msss 23 Again, I think I just said earlier I don't 24 recall the content of this conversation and the

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context in which it was had as well. I can't really speak towards this because I just don't remember.

If this transcript reflects on multiple occasions that in direct questioning by Mr. Kearney you tell him that the continuance of disability form and the authorization form you're asking him to sign were not DMS's forms but were Jefferson-Pilot's forms, if that's the case, would you have been telling him the truth?

MR. ELLIS: Objection.

- Again, I don't feel comfortable with that or able to respond to that because I don't know the circumstances of what was going on at this point in
- Okay. Is it true that the forms being sent to Mr. Kearney were Jefferson-Pilot's forms and not DMS's forms?

Forget about the conversation. Forget about the transcript, put it away. Is it true that the forms being sent to him were not DMS's forms but were rather Jefferson-Pilot's forms?

MR. ELLIS: Objection.

A. They were Jefferson-Pilot forms that we produced from our claimant system at that point in

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time that were different than the ones I think were used in the past. Q. How did they become Jefferson-Pilot's forms? They were your forms before you were doing the Jefferson-Pilot business, and then when you took on Jefferson-Pilot's business you continued using your forms? MR. ELLIS: Objection. Argumentative.

Q. (By Mr. Roberts) Right?

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03:54:23 10

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03.54:14

It's the continuance of disability authorization forms that were produced from our claimant system on behalf of Jefferson-Pilot. Whether it's their form, our form, I don't know what the correct characterization should be for that.

Q. But you know that it was important to Mr. Kearney, whether it was material or not, it was important to him that they be Jefferson-Pilot's forms as opposed to yours, and you told him that they are Jefferson-Pilot's forms and that wasn't true, was it, sir?

MR. ELLIS: Objection, Misstates the testimony, misstates the transcript.

what was said to him at that time. I believe Mr. Kearney was well aware that Disability Management Services was taking over the administration of his claim, so I wouldn't imagine that he would have expected anything other than receive claim forms from our office.

MR. ROBERTS: I have no further questions at this time. We'll continue in progress.

MR. ELLIS: Give us one minute here. THE VIDEOGRAPHER: Going off record at 3:54 p.m.

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(A recess was taken)

MR. ELLIS: Okay, let's go back on the record for just a moment, please. THE VIDEOGRAPHER: Back on record at 3:57 p.m.

CROSS EXAMINATION BY MR. ELLIS:

Q. Just one question. Since Counsel was quoting to you from at least a small portion of a recorded transcript, I'm going to ask you to read the transcript to yourself, just above and below the part he's talking about, and ask you if that explains

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mssep 11 12

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Again, I don't recall that conversation or

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1 whose forms they were to Mr. Kearney.	
MR. ROBERTS: Objection. That isn't	
3 the only portion of the transcript. The	
4 transcript goes on for six or seven pages	
5 about Mr. Kearney's concern about whose form	ı
6 it is. So what Counsel is asking Mr. Mills to	ļ
7 do is not the full transcript. The full	
8 transcript will be submitted to the Court. Go	
9 ahead.	ı
A. What was the question again?	ļ
Q. Was your statement that these were	İ
12 Jefferson-Pilot forms, or forms submitted that all	
13 Jefferson-Pilot people were paying submitted through	ı
14 you?	
MR. ROBERTS: Objection.	
A. This was forms that everyone at	- 1
17 Jefferson-Pilot was completing through us sending	
18 them out.	
95.59.38 19 Q. Thank you.	1
MR. ELLIS: That's all the questions	
21 I have.	
Oh, I have one other.	
Q. (By Mr. Ellis) To your knowledge, was	
24 Mr. Kearney's benefit ever cut off?	Ì
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03-59-48	1	MR. ROBERTS: Objection.
03:59:49	2	A. No, Mr. Kearney's benefit was never cut
	3	off.
63:59:52	4	MR. ELLIS: Thank you. That's all I
	5	have.
03,59:54	6	MR. ROBERTS: We'll continue in
	7	progress.
03:59:55	8	THE VIDEOGRAPHER: Going off record
	9	at 3:59 p.m.
03 59:58	10	(Witness excused)
03.59:58	11	(Deposition concluded at 3:59 p.m.)
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ERRATA SHEET
To be signed by deponent and returned to counsel.
I, the undersigned, ROBERT MILLS, do hereby certify that I have read the foregoing transcript of my testimony given in the matter of JEFFERSON-PILOT v. KEARNEY and to the best of my knowledge, said transcript is true and accurate with the exception of the corrections listed below:
PAGE LINE CORRECTION
DATE OF SIGNING
5.14.04 /sr
3.14.04 /31

COMMONWEALTH OF MASSACHUSETTS
Hampden

I, Sharon R. Roy, a Notary Public in and for the Commonwealth of Massachusetts, do certify that pursuant to notice, there came before me on the 14th day of May, 2004, at the law offices of ACCURATE COURT REPORTING, 1500 Main Street, Springfield, Massachusetts the following named person, to wit: ROBERT MILLS, who was by me duly sworn to testify to the truth and nothing but the truth as to his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon examined upon his oath and said examination reduced to writing by me; and that the deposition is a true record of the testimony given by the witness, to the best of my knowledge and ability.

I further certify that I am not a relative or employee of counsel or attorney for any of the parties, nor a relative or employee of such parties, nor am I financially interested in the outcome of the action.

Witness my hand, this 4th day of June, 2004.

Sharon R. Roy

My commission expires:

April 28, 2011

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June 5, 2004

WILLIAM R. ELLIS, ESQUIRE WOOD & LAMPING LLP 600 Vine Street, Suite 2500 Cincinnati, OH 45202-2491

RE: Jefferson-Pilot v. Kearney

Dear Attorney Ellis,

The deposition transcripts of Todd Ditmar, Robert Bonsall, and Robert Mills taken May 13th and 14th in the above captioned case are now ready for signature.

According to the Massachusetts Rules of Civil Procedure, the witness has 30 days from the date of receipt to read and sign the deposition transcript. If the witness does not read and sign the errata sheet within the time allowed, it will be deemed signed.

Thank you in advance for your cooperation in this matter,  $% \left( 1\right) =\left( 1\right) +\left( 1\right) +$ 

Sincerely,

Sharon R. Roy Registered Professional Reporter

cc: Michael Roberts, Esq.

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